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**UNITED STATES CIRCUIT COURT
FOR THE STATE OF OREGON**

Daniel A. Bernath, an individual,

Plaintiff,

vs.

Yelp, Inc., a Delaware Corporation

Defendant.

) Case No. '13 - CV - 1796 AC

) COMPLAINT FOR DAMAGES

) Racketeering Influenced and

) Corrupt Organizations

) Violation of 18 USC § 1962

) Breach of Contract,

) Breach Covenant of Good Faith and

) Fair Dealing,

) Promissory Estoppel

) Fraud, Negligent Fraud

) Unfair Business Practices

) DAMAGES PRAYED \$20,000,000

) Treble Damages , RICO and Unfair
Business Practices, Punitive Damages
Attorney Fees

JURY TRIAL DEMANDED

Preliminary paragraphs

23 Plaintiff alleges:

Complaint

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54341

29 sought a vehicle where he could transport other disabled and/or
 30 wounded veterans and injured TSA officers to picnics, medical visits
 31 and gatherings to give said veterans some pleasure in their remaining
 32 years of their lives after giving so much to their country and fellow
 33 citizens.

34 2. Plaintiff provides tours of Portland area locations for which he is
 35 compensated.

36 3. Yelp, Inc. is a Delaware Corporation with its headquarters in
 37 California and operating in the State of Oregon. Yelp has been called
 38 the modern day “mafia” by a San Diego Superior Court judge. Yelp
 39 has been called “organized crime” by a Portland Oregon judge who
 40 condemned Yelp’s business practices of cruel and cynical extortion
 41 against small businesses across the country and lack of ethics as
 42 despicable and unconscionable, urging the attorney general to act.

43 4. **Bernath-Groupon contract:** Plaintiff desired to enter into an
 44 agreement with Groupon to sell admissions to his tour. A condition
 45 precedent to such an agreement with Groupon was that Plaintiff must
 46 enter into a contract with Yelp, Inc. As such, Groupon was acting as
 47 the disclosed agent of Yelp, Inc.

48 **Bernath-Yelp, Inc. contract:** Plaintiff entered into the contract

48 with Yelp solely because Groupon required it as a condition precedent
49 to a contract with Groupon. Groupon and Plaintiff then entered into
50 the contract.

51 5. As Yelp promised and represented that it would not permit
52 disparaging and false statements on its website regarding merchants,
53 including Plaintiff, Plaintiff did in fact post information in compliance
54 with Groupon's requirement and Yelp's requirements as to permit
55 Groupon to sell tickets to tourists. At no time did Plaintiff request or
56 have knowledge that any of the contractees of Yelp would violate the
57 Terms of Service of Yelp or the contract with Groupon. As such,
58 Plaintiff reasonably relied upon the promises and Terms of Service of
59 both Yelp and Groupon. Plaintiff's reliance on Groupon's
60 representation and Yelp's representations were reasonable and
61 foreseeable.

62 6. Plaintiff is informed and believes and thereupon alleges that Linda
63 Abundis is the true name of "Tabitha J of Eugene Oregon"

64 7. **Groupon /Yelp and Linda Abundis Contract (Bernath 3rd**
65 **Party Beneficiary)** Plaintiff is a third party beneficiary of the
66 agreement between Groupon and Linda Abundis. In the agreement
67 with Groupon and Yelp, Inc., Linda Abundis, aka Tabitha J, agrees

68 that the services of Plaintiff are **"as is"** and that she knowingly and
69 voluntarily **waives all rights** to **"disparage"** the services of
70 Plaintiff. The purpose of this clause in the agreement to which Linda
71 Abundis and all contractees of Groupon are bound by this waiver
72 because people who buy services through Groupon and are buying
73 outside new or different services than what they are accustomed to
74 will likely disparage the services and post false and defamatory
75 reviews on Yelp, Inc.'s website, (e.g. there is a mismatch between the
76 accustomed preferences of Groupon users and the actual new and
77 unique services that the businesses provide when they utilize Groupon
78 as sellers) among other things.

79 **8.** On or about April 5, 2013, Linda Abundis in violation with the
80 contract with Groupon to which Plaintiff is a third party beneficiary
81 and using the anonymous name of "**Tabitha J**" of "Eugene Oregon"
82 disparaged Plaintiff.

83 **9.** Linda Abundis is not a party to this action. The defamation is merely
84 evidence of Yelp's breach of contract and Yelp is not being sued for
85 defamation.

86 **10.** Plaintiff entered into a contract with Yelp, Inc. a business entity; form
87 unknown whereby Yelp, Inc. would advertise Plaintiff's services. As

88 part of the first party agreement Yelp, Inc. covenants, among other
89 things, that it will protect contractees, such as Plaintiff, from
90 defamation when a person using an anonymous name will accuse
91 contractee, such as Plaintiff, with committing a crime, defamations
92 etc. by removing said false claim by a person attempting to damage a
93 person anonymously.

94 11. The agreement was modified by the parties to restore all common law
95 rights for Yelp and Plaintiff to all common law protections and
96 restoring jurisdiction to forums that were appropriate for breach of
97 contract and tort.

98 12. In fact, Yelp, Inc., to encourage circulation to its publication, has
99 made people like the once anonymous Tabitha J of Eugene, by
100 encouraging her and others to act untruthfully and irresponsibly so as
101 to drive viewer traffic to Yelp, Inc.'s website e.g. to "**Mouth Off**"
102 about people and businesses on the one hand, while simultaneously
103 taking Plaintiff's advertising money pursuant to the contract with
104 Plaintiff. Yelp, Inc. in its irresponsible scheme to drive viewer traffic
105 by being controversial and irresponsible¹ contracts with its writers that
106 once a contractee writer drafts a defamation that the defamation is

¹ Yelp boasts that it has raised its unique visitor count by forty million; to 108,000,000, up from 71,000,000 a year earlier.

107 then the property of Yelp, Inc. so that they can use the statements of
108 Linda Abundis in advertising on Google, Yahoo and any other
109 platform.

110 13. In contradiction to urging its contract writers to "Mouth Off",
111 Yelp, Inc. represents and contracts: "**And since user trust and**
112 **transparency are important to us, anonymous users who are**
.113 **disruptive to the community will probably be dealt with more**
114 **sternly than those who stand behind their words.**"

115 The aforesaid clause is enforceable as it is an implied obligation to use
116 good faith on the part of Yelp, Inc

117 14. The agreement between Yelp and Linda Abundis aka Tabitha J
118 includes:

119 A "user" is someone who accesses, browses, crawls, scrapes, or in any way
120 uses the Site. "We," "us," and "our" refer to Yelp.

121 By "use" we mean use, copy, publicly perform and display, reproduce,
122 distribute, modify, translate, remove, analyze, commercialize, and prepare
123 derivative works of Your Content.

124 We reserve the right to remove, screen, edit, or reinstate User
125 Content from time to time at our sole discretion for any reason or

126 no reason, and without notice to you. For example, we may remove
 127 a review if we believe it violates our Content Guidelines.

128 **6A RESTRICTIONS**

129 A. You agree not to, and will not assist, encourage, or enable others to use
 130 the Site to:

- 131 i. Violate our Content Guidelines, for example, by writing a fake or
defamatory review, trading reviews with other businesses, or compensating
someone or being compensated to write or remove a review;
- 134 ii. Violate any third party's rights, including any breach of confidence,
 135 copyright, trademark, patent, trade secret, moral right, privacy right, right
 136 of publicity, or any other intellectual property or proprietary right;
- 137 iii. Threaten, stalk, harm, or harass others, or promote bigotry or
 138 discrimination;
- 139 iv. Promote a business or other commercial venture or event, or otherwise use
 140 the Site for commercial purposes, except in connection with a Business
 141 Account and as expressly permitted by Yelp;
- 142 v. Send bulk emails, surveys, or other mass messaging, whether commercial in
 143 nature or not; engage in keyword spamming, or otherwise attempt to
 144 manipulate the Site's search results or any third party website;
- 145 vi. Solicit personal information from minors, or submit or transmit pornography;
 146 or
- 147 vii. Violate any applicable law.

148

149 **6B [Y]ou agree not to act contrary to {the foregoing contract**

150 terms}{(even if permissible under applicable law) without providing 30 days'

151 prior written notice to us here, together with any information that we may
 152 reasonably require to give us an opportunity to provide alternative remedies or
 153 otherwise accommodate you at our sole discretion.

154 **15.** Yelp, Inc. has enforced violations of its so called Terms of Service by
155 removing defamations and untrue statements that were not submitted
156 to Yelp, Inc., 30 days in advance and for the sole reason that they are
157 disparaging of goods and/or services. Yelp, Inc. did not do so in the
158 instant matter.

159 **16.** Yelp did not remove the disparagement even though Tabitha J had
160 waived any right to post said defamations and Yelp did not remove the
161 disparagement even though Tabitha J did not submit the
162 disparagement to Yelp thirty days before publication for their review
163 and approval and in violation of its contract with Linda Abundis aka
164 Tabitha J.

165 **17.** Yelp, Inc., has entered into an agreement with Plaintiff for advertising
166 in Oregon. As part of each agreement is a covenant of good faith and
167 fair dealing whereby each party will receive what they expect in the
168 agreement.

169 **18.** Yelp, Inc. by taking ownership of the defamations and profiting
170 financially from the defamation and thus encouraging defamation and
171 other untruthful statements, whilst simultaneously working on behalf
172 of an advertiser such as Plaintiff has breached this covenant of good
173 faith and fair dealing.

174 19. Alternatively, Yelp, Inc., is promissory estopped from forgoing action
175 to remove, and has a contractual duty to Plaintiff not permit
176 publication of defamation, accusations that Plaintiff has committed a
177 crime or crimes as they have promised.

First Cause of Action

Violation of 18 USC § 1962.

Against Yelp, Defendant

181 20. Plaintiff realleges and reincorporates paragraphs 1 through 18 as if fully
182 stated herein.

183 21. Defendant Yelp violated its own published policies and contractual terms,
184 hiding their actual intentions, data and schemes, deceit to lure Plaintiff into
185 transacting doing business with Yelp, not disclosing Yelp's deserved
186 reputation as being an unethical, unconscionable and "modern day
187 mafia/organized crime", refusing to and failing to honoring its agreement to
188 not permit its writer to harm a business on Yelp's publications, not disclosing
189 the risks of posting data, e.g. "claiming" Plaintiff's information on Yelp's
190 publication and misstating the facts to lure the Plaintiff into transactions
191 described here and thus Yelp has committed corporate fraud.

192 22. Yelp failed to tell Plaintiff even though Yelp made promises to protect
193 Plaintiff from harm. Yelp did breach this duty created to disclose certain

194 information as defendant Yelp has made deceitful statements of half-truth or
195 concealed material facts.

196 23. Plaintiff has suffered a direct injury proximately to plaintiff's business and/or
197 property caused by the racketeering activity of defendant Yelp, Inc.

198 23. Defendant Yelp's acts of deception and other unlawful acts were
199 accomplished by mail and/or wire fraud as RICO predicate acts.

200 24. Said wrongful acts of Yelp caused Plaintiff economic harm as stated herein.

201

202 **Second Cause of Action**

203 **Breach of Contract,**

204 **Against Yelp, Defendant**

205 24. Plaintiff realleges and reincorporates paragraphs 1 through 18 as if fully
206 stated herein

207 25. Defendant Yelp, Inc., entered into a contract with Plaintiff advertise his tour,
208 to run the tourist populating portion of his enterprise, to act as de facto
209 partner to Plaintiff, to share the fees realized from advertising on Yelp, Inc.,
210 and if the promotion failed that Yelp-as would Plaintiff-would share in the
211 loss, to among other things to monitor their own reviews for false
212 statements, false allegations that a person had committed a crime, all said

213 statements by reviews employed by Yelp and of which Yelp had ownership
214 and would and has created derivative works from false statements, would be
215 used by Yelp, Inc. for any purpose . Yelp, Inc. encouraged false statements,
216 and even though it was proved to Yelp, Inc. that the statements were false,
217 disparaging and defamatory, Yelp, Inc. did refuse to remove said writings
218 from its website Yelp.com .

219 26. As such, Yelp Inc., breached the agreement and breached the agreement of
220 Good Faith and Fair Dealing found in every contract in the State of Oregon.
221 Yelp, Inc. also are **Promissorily estopped** representing that false statement of
222 fact reviews of which they own and profit from will be removed on the one
223 hand, and then refusing to remove false statements of fact on the other hand.

224 27. Yelp, Inc. as the principal or agent or partner of Groupon is also
225 promissorily estopped from on the one hand stating that they will remove
226 disparaging comments about merchants but refusing to do so thereafter.
227 Yelp, Inc. also is thus promissorily estopped from denying their statement
228 that services of merchants purchased through Groupon are “as is” and said
229 “as is” services may not be disparaged and refusing to enforce its contract
230 agreement with Linda Abundis.

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231

Third Cause of Action

232

Breach of Covenant of Good Faith and Fair Dealing

233

Against Yelp, Inc., Defendant

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28. Plaintiff realleges and reincorporates paragraphs 1 through 18 as if fully
stated herein.

235

29. Yelp, Inc., breached the Covenant of Good Faith and Fair Dealing found in
every contract in the State of Oregon by the misconduct alleged herein.

238

Fourth Cause of Action

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Breach of Covenant of Good Faith and Fair Dealing

240

Against Yelp, Inc., Defendant

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30. Plaintiff realleges and reincorporates paragraphs 1 through 18 as if fully
stated herein

242

31. Yelp, Inc. is promissorily estopped from representing that false statement of
fact that reviews of which they own, control and profit from will be removed
on the one hand, and then refusing to remove false statements of fact on the
other hand.

247

Fifth Cause of Action

248

Negligent Misrepresentation

249

Against Yelp, Inc., Defendant

250

253 28. Defendant Yelp, Inc., intended that Plaintiff rely upon the representations.

256 30. As a proximate result of Yelp's negligent conduct, Plaintiff has suffered and
257 will suffer, and continues to suffer general and special damages in an
258 amount to be proved at time of trial and within the jurisdictional limits of
259 this complaint.

Sixth Cause of Action

Fraud

Against Yelp, Inc., Defendant

267 **33.** The representations of Yelp and its agents, principals and/or partner
268 Groupon were false and fraudulent as disparaging remarks, including false
269 claims of Plaintiff committing crimes and being dangerous were placed into

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270 Yelp's publication and not removed although communications with Yelp
271 were made that said violations of Yelp's contract be enforced.

272 **34.** Defendant Yelp, Inc. made the promises to Plaintiff with the intentional
273 pattern and practice to deceive merchants, such as Plaintiff, so that they
274 would provide Yelp, Inc., and Groupon with content to profit financially and
275 not seek other opportunities to advertise or seek customers at other locations
276 and businesses where he would not face the business destroying defamations
277 and disparagement of Tabitha J aka Linda Abundis.

278 **35.** Accordingly, as a result of Yelp, Inc.'s, fraudulent conduct, Plaintiff has
279 suffered and will continue to suffer compensatory, general and special
280 damages in an amount according to proof at trial but within the jurisdictional
281 limits of this complaint.

Seventh Cause of Action

Unfair Business Practices ORS 646.607 (1) et seq.

Against Yelp, Inc., Defendant

289 37. Oregon's unfair business practices act prohibits acts of unfair competition,
290 (e.g. any fraudulent business act or practice and conduct which is likely to
291 deceive and is fraudulent.)

292 38. As more fully explained herein above, Defendant's acts and practices are
293 likely to deceive, constituting a fraudulent business act or practice. This
294 conduct is ongoing and continues to this date.

295 39. Specifically, as set forth above, Defendants engaged in deceptive business
296 practices with respect to gaining customers to its website and related
297 matters.

298 40. By engaging in the above referenced acts and/or practices alleged herein,
299 Defendant has violated Oregon laws and regulations and said predicate acts
300 are therefore *per se* violations of law.

301 41. Yelp's misconduct gave, and has given, Defendant Yelp's misconduct as
302 alleged herein an unfair competitive advantage over their competitors. The
303 scheme implemented by Yelp, Inc. is designed to defraud Oregon consumers
304 and enrich Yelp, Inc.

305 42. The foregoing acts and practices of Yelp, Inc. have caused substantial harm
306 to Oregon consumers.

309 Plaintiff into posting his profile onto Yelp, Inc.'s website lured by Yelp's
310 false promises.

311 44. Yelp, Inc. has been unjustly enriched and should be required to disgorge
312 their illicit profits and/or make restitution to Plaintiff and other Oregon
313 consumers who have been harmed and be enjoined from continuing such
314 practices. As a result of the aforesaid acts and misconduct, Plaintiff has lost
315 money and suffered injury in fact, and other members of the public falling
316 victims to Yelp's false promises are likely to be injured.

317 45. The harm to Plaintiff and members of the general public outweigh the utility
318 of Defendant's *de facto* policy and practices and fraudulent representations.
319 Consequently, Yelp, Inc.'s policy and practice are an unfair business act or
320 practice.

321 46. Defendant is promissory estopped from denying its representations and
322 avoiding the harm that it has caused to plaintiff

323 **WHEREFORE**, Plaintiff prays for judgment against Defendants Yelp, inc.,

324 1. As a direct and foreseeable result of Defendant's breach of contract, breach
325 of covenant and fair dealing and promissory estoppel, Plaintiff suffered
326 damages in the amount of \$10,000,000,
327 2. Special Damages of \$10, 000,000,.

Complaint

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JURY TRIAL DEMANDED

339 Daniel A. Bernath, Plaintiff
340 OCTOBER 7, 2013